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No. 623

In the Supreme Court of the United States

OCTOBER TERM, 1961

EASTERN EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 20a) which dismissed appellants' complaint seeking an injunction and a decree setting aside an order of the Interstate Commerce Commission. Appellants are a motor common carrier and three motor carrier associations (J.S. 1a–2a). The order of the Commission which they sought to enjoin authorized certain freight forward-

ers to offer rates for 10,000–30,000 pound minimum shipments at the same level as those offered by appellants for similar quantities (J.S. 12a, 39a).

In July 1958, certain railroads inaugurated a trailer-on-flatcar (TOFC or "piggyback") service which requires the shipper to furnish the trailers and transport them to and from the railroads' terminal loading ramps, between which they are transported by rail. Known as Plan III to distinguish the service from other TOFC arrangements,[1] these rail rates provide for the transportation of not more than two trailers on one flatcar, the trailers to be empty or loaded with not more than 70,000 pounds of freight, with no one commodity exceeding 60% of the total weight of the shipment. The Plan III rail rates have been approved by the Commission in an order which appellants, among others, are attacking in the United States District Court for the Western District of Missouri (*Cooper-Jarrett, Inc.* v. *United States,* No. 13469, pending) (J.S. 8–9).

Freight forwarders are regulated by the Interstate Commerce Commission under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001 *et seq.*

[1] Plan I offers motor carriers the privilege of shipping their trailers, in substitution for highway movement, via railroad flatcar; Plan II service is offered directly to the shipping public, the railroads providing the motor transportation from the shipper's premises to the railroad terminal and from the railroad terminal at the other end of the movement to the receiver's premises, with the movement between the railroad terminals being accomplished on railroad flatcars; Plan IV is identical with Plan III, except that the shipper must also provide the flatcar.

Typically, they assemble and consolidate separate consignments of freight and ship them as a single unit via motor, rail or water to a destination at which they separate the individual consignments and distribute them to the respective consignees. Forwarders are in most respects shippers in relation to the line-haul common carriers whom they patronize. They pay normal rates but, by reason of the discount for volume shipments allowed in those carriers' tariffs, pay less than the total their customers would have to pay for separate shipments of the goods. By charging rates approximating those which the line-haul carriers would charge for separate shipments, the forwarders find their profit in the difference between those rates and the lower volume rates which they themselves pay.

By tariff schedules filed with the Commission to become effective on August 20, 1958, and later dates, certain freight forwarders published numerous commodity rates based upon weight minima of 10,000–30,000 pounds and which reflected the reduction in cost for line-haul transportation between New York and Chicago made available by the Plan III TOFC rail rates (J.S. 4a–5a, 22a, 24a). Upon the protest of appellants, who are also in a position to use TOFC service (J.S. 8, 39a) and whose rates were at the same level as those proposed by the forwarders (J.S. 8, 12a, 39a), the Commission suspended most of the new rates (J.S. 5a, 22a). Appellants charged that forwarders are required by Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), to operate by assembling and consolidating so-called small shipments for line-

haul as a single unit and by deconsolidating and distributing the separate consignments at destination, while under the proposed rates the forwarders were enabled unlawfully to accept full truckload, or volume, shipments and to provide for their transportation without performing those functions (J.S. 7a, 25a–27a, 37a–38a). They further charged that forwarders are barred by the Act from providing the trailers in which the goods are loaded and which are carried on flatcars from origin to destination (J.S. 7a, 29a). Finally, they charged that the proposed forwarder rates would divert traffic from the motor common carriers to an extent impairing their ability to provide adequate public service, and would thereby violate the National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Section 1 (J.S. 7a–8a, 26a, 37a).

The rate suspensions expired on March 20, 1959, and later dates, and the proposed rates became effective (J.S. 5a, 22a). On September 4, 1959, after a full evidentiary hearing, the Commission issued its report and order finding the rates lawful and discontinued the proceedings (J.S. 21a–34a). It found that forwarders had long been allowed to offer volume rates, that there was nothing in the Act which limited the weight of a shipment which a forwarder may handle, and that such rates were not beyond the proper sphere of forwarder operations (J.S. 27a–28a); that under the proposed rates the forwarders would consolidate more than one shipment into each trailer except in occasional instances, and would tender two trailers to the railroads as a single ship-

ment in all cases (J.S. 28a–29a); and that the trailers supplied by the forwarders were containers or articles of commerce which the forwarders were not prohibited from supplying (J.S. 30a–31a).

Appellants filed their complaint in the district court on November 10, 1959. On February 15, 1960, the same day appellees filed their answer, the Commission *sua sponte* reopened the proceedings for reconsideration. At the Commission's request, the district court on March 1, 1960, stayed its proceedings pending further agency action. Appellants then filed with the Commission a petition which requested answers to a number of questions relating to their contentions. On April 8, 1960, the Commission issued its report on reconsideration (J.S. 35a–46a). It stated that answers to all questions in the petition which were important to the issues would be found either in its prior report or in the report on reconsideration (J.S. 36a). After reiterating its previous findings, it concluded further that the National Transportation Policy does not require rates to be maintained at an artificially high level in order to protect the traffic of a competing mode of transportation (J.S. 39a); that forwarder competition under the new rates would not seriously impair appellants' ability to serve the public (*ibid.*); that the new rates were compensatory, and no lower than necessary to meet appellants' competition (J.S. 40a); and that refusal to approve the rates would amount to an artificial apportionment of traffic to the detriment of healthy competition and in violation of the National Transportation Policy (*ibid.*). The Commission also specifically found the

evidence to show that the forwarders operating under these rates would in the ordinary and usual course of their undertaking perform the assembly, consolidation and distribution services contemplated by Section 402(a)(5) of the Act (J.S. 41a). The district court vacated its stay on May 31, 1960, and after briefing and argument, entered its final judgment dismissing the complaint on September 5, 1961.

The district court found that the evidence before the Commission clearly showed both the long existence of forwarder volume rates and the ability of motor carriers to survive in the face of forwarder competition for smaller shipments (J.S. 13a–14a); that the Commission had made adequate findings, supported by substantial evidence, to support its conclusions (J.S. 15a, 19a); that the Commission had properly approved the legality of forwarder volume rates and of forwarder supply of the trailers to be carried on flatcars by the railroads (J.S. 15a–16a); and that the Commission had properly applied the National Transportation Policy in upholding the rates at issue (J.S. 17a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants seek essentially to challenge the substantiality of evidence supporting the Commission's order and to dispute the wisdom with which the Commission resolved issues of transportation policy committed by Congress to the agency's discretion. Each branch of the attack has been thoroughly considered and properly rejected

by the court below, and there is no need for further review.

1. Appellants argue (J.S. 11, 16) that volume rates such as those upheld by the Commission and the district court are a novelty in the forwarder industry, and that they are inconsistent with the statutory functions assigned to forwarders by Part IV of the Interstate Commerce Act. But, like the Commission, the court below found this assertion to be in conflict with the evidence showing that forwarders have included numerous volume rates in their tariffs since shortly after the beginning of forwarder regulation in 1942 (J.S. 13a); that Congress was aware that forwarders were even then handling volume traffic when it enacted Part IV of the Act (J.S. 16a); and that in operating under these rates, forwarders would "in the ordinary and usual course of their undertaking" perform all the assembly, consolidation, break-bulk and distribution services required of them by Section 402(a)(5) of the Act (J.S. 16a). Similarly, the district court held (J.S. 14a) that the evidence fully supported the Commission's finding which rejected appellants' prediction of intolerable financial damage from the new forwarder rates. Indeed, appellants do not even attempt to challenge the Commission's findings that the rates are compensatory and no lower than necessary to meet appellants' competition—findings leading to the Commission's conclusion (approved by the court below, J.S. 17a) that to sustain appellants' contentions would be contrary to the National Transportation Policy. In short, the district court found the Commission's order to be

based upon substantial evidence and fully adequate findings, and this issue is not one which warrants further review. *Radio Corp. of America* v. *United States*, 341 U.S. 412, 420; cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–91.[3]

2. Despite the inferences which appellants would have this Court draw from their statements (J.S. 12, 16), the Commission has not unlawfully authorized forwarders to supply their own means of line-haul transportation. Section 418 of the Act, 49 U.S.C. 1018, prohibits the utilization by forwarders "except in the performance within terminal areas of transfer, collection, or delivery services" of "the instrumentalities or services of any carriers other than common carriers." But the rates which the Commission and the district court upheld merely allow forwarders who ship by rail common carriers to take advantage equally with other shippers of the railroads' Plan III TOFC service by supplying the containers to be loaded on the railroads' flatcars. See *Chicago, M., St. P. & P.R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 468; cf. *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235, 251, 252–253. The Commission properly found (J.S. 30a) and the court below agreed (J.S. 11a–12a, 16a–17a) that where, as here, the railroads hold themselves out, not to furnish trailers, but to transport them, empty or loaded, at the rates in their Plan III tariffs, the trailers are to be re-

[3] While appellants complain (J.S. 7–8, 11) of the Commission's failure to make specific findings on each one of the questions contained in their petition after the proceeding was

garded as containers or articles of commerce; and the fact that the trailers are legitimately used by the forwarders for assembly and distribution within the terminal areas does not deprive the forwarders of their rights as shippers to supply them, least of all by reason of Section 418, which simply serves to prevent forwarders from shipping outside a terminal area by contract rather than common carrier. See S. Rep. No. 132, 77th Cong., 1st Sess., p. 7 (1941); H. Rep. No. 1172, 77th Cong., 1st Sess., pp. 17–18 (1941); Hearings before the Senate Interstate Commerce Committee on S. Res. 146, 76th Cong., 3d Sess., pp. 393–394 (1940); Hearings before the House Interstate and Foreign Commerce Committee on H.R. 3684, 77th Cong., 1st Sess., p. 259 (1941). Compare Section 410(h), 49 U.S.C. 1010(h).

3. Appellants cannot prevail in their attempt to overturn the Commission's evaluation, on the record before it, of the bearing of the National Transportation Policy on the rates in issue. There is no statutory impediment to the establishment of the forwarder rates. Since these rates are no lower than those of the motor carriers, competition will be in terms of service (J.S. 39a), with the public benefiting from the choice at equal rates of either transportation agency. In fact, it is the propriety and desirability in the public interest of making available to the public the services of different transportation agencies that

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reopened, it is clear that the Commission is required only to consider and discuss material issues, and that formal answers are not required, particularly on questions not material. Administrative Procedure Act, Section 8(b), 5 U.S.C. 1007(b); *Minn. & St. L. Ry.* v. *United States*, 361 U.S. 173, 192–194.

underlies this Court's decision in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83. Nor is there any question of encroachment upon any "inherent advantages" of appellants. First, this is in no sense a case of a higher-cost transportation agency undercutting the rates of a lower-cost agency; and, secondly, with competition at the same level of rates, there is no infringement of any inherent advantage of superior service which the motor carriers may possess. Indeed, there was no attempt by appellants to prove that any such inherent advantages even exist.

It is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy. For the policy directs the Commission to foster "economical and efficient service," and cannot be deemed to require the forwarders to maintain rates at an artificially high level merely to protect the traffic of the motor carriers from fair and undestructive competition, thereby depriving the public of forwarder service at competitive rates. See 49 U.S.C. 15a(3). And, as previously noted, the Commission expressly concluded (J.S. 39a), "The evidence of record does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to continue to survive and serve the public," a conclusion which the district court found "amply justified" by the record (J.S. 17a). Moreover, the implementation of the National Transportation Policy is a matter uniquely for the Commission, and when, as the district court found to be the case here (J.S. 17a), the agency's findings are both rational and sup-

ported by substantial evidence, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88; *Schaffer Transportation Co.* v. *United States, supra*, 355 U.S. at 92.

CONCLUSION

Since this appeal presents no issue warranting plenary consideration, the judgment of the court below should be affirmed.

Respectfully submitted.

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